IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.10 OF 2006

Mahadu Rakhamaji Undre & Ors. ...Appellants
Vs.
Green Lands Parnership Firm & Ors. ...Respondents

Mr.N.V.Walavalkar i/b Mr.G.H.Keluskar for the Appellants
Mr.V.G.Peshave for the Respondent Nos. 1 to 5.

CORAM: A.S.OKA, J.
DATED: APRIL 24,2006.

P.C.:

1. Heard learned Senior Counsel for the Appellants and the Advocate for Respondent Nos.1 to 5. Following substantial questions of law arise :

i) Whether the learned Trial Judge could have dismissed the suit on the ground that the same was barred by the principles of Res judicata without framing any issue on res-judicata and without treating the said issue as a preliminary issue ?

ii) Whether the Appellate Court while dismissing the Appeal preferred by the Appellants could have held that the suit was barred under the provisions of Order II Rule 2 (3) of the Code of Civil Procedure, 1908 when the Trial Court had not recorded such a finding ?

2. By order dated 23rd March 2006, the parties were put to the notice that the Second Appeal will be heard finally at the stage of admission. The learned Senior Counsel for the Appellant has stated that a notice has been duly served to the Respondent Nos. 6 and 7 on more than one occasion and

the Respondent Nos. 6 and 7 are put to notice that the Second Appeal will be decided at the stage of admission. However, none appears for the said Respondents.

3. The Appellants are the original Plaintiffs. An Application was made at exh.12 by the Respondent Nos.1 to 5 herein (Defendant Nos.1 to 5) raising a preliminary objection to the maintainability of the suit. The learned Judge heard the arguments of the learned Advocates for the parties on the said application. By order dated 10th August 2004, the learned Judge allowed the said application at exh.12 and dismissed the suit on the ground that it is hit by the principles of res judicata.

4. An Appeal was preferred by the Appellants in the District Court. The Appeal was dismissed. However, while dismissing the Appeal the Appellate Court has not only confirmed the finding on the question of res judicata but also held that the suit was barred under Sub Rule 3 of Rule 2 of Order II the said Code.

5. The learned Senior Counsel for the Appellants submitted that while hearing the application at exh.12, the Trial Court could not have finally decided the issue of res judicata. Even assuming that the issue arose, the Trial Court should have framed the issue and ought to have permitting the parties to lead evidence. He submitted that though the Trial Court dismissed the suit only on the ground of bar of res

judicata, while dismissing the Appeal filed by the Appellants the Appellate Court held that the bar under sub rule 3 of Rule 2 of Order II was attracted. He submitted that the said approach was completely illegal. Shri Peshave learned Counsel for the Respondent Nos.1 to 5 submitted that on plain reading of the plaint, the suit was hit by the principles of res judicata. He submitted that even bar under sub rule 3 of rule 2 of Order II of the said Code was attracted.

6. I have considered the submissions. Perusal of the Judgment and order dated 10th August 2004 shows that the learned Judge has passed the said order on hearing the Application at Exh.12. Paragraph 1 and 2 of the order are reproduction of the facts. In paragraph No.3 of the Judgment, the learned Judge has referred to certain decisions of the Apex Court relied upon by the Advocate for the Respondent Nos.1 to 5. After merely referring to the citations, the learned Judge jumped to the conclusion that the suit is liable to be dismissed. There is no discussion as regards issues which were framed and decided in the earlier suit and issues which arise in the present suit. Apart from the fact that the suit has been dismissed without framing preliminary issue and without granting an opportunity to the Appellants to lead evidence, there is hardly any reason recorded for coming to the conclusion that the suit was barred by principles of res judicata. So far as the Appellate Court is concerned, in my view, the Appellate Court ought to have remanded the matter to the Trial Court for

consideration of application at Exh.12. In fact, the Appellate Court has noted that a submission made on behalf of the Appellants for passing the order of remand. While dealing with the request for remand, the Appellate Court has observed that the bar under Order II Rule 2 (3) was also attracted. It is pertinent that this was not even the finding of the Trial Court but the Appellate Court has recorded the said finding while decididng the Appeal filed by the Appellants.

7. In my view, the approach of both the Courts below was completely erroneous. The Appellate Court ought to have accepted the prayer made for remand. Hence, The impugned Judgments and orders deserve to be quashed and set aside. The Trial Court will have to be directed to hear the application at Exh.12 afresh after hearing the parties and to decide as to whether it is necessary to frame any preliminary issues or whether the plaint can be rejected. If he does not reject the Application, and if he is of the view that a preliminary issue will have to be framed, he will do so and will decide the issue only after hearing parties on the said issue.

8. Hence I pass the following order :

i) The impugned Judgments and Decrees are quashed and set aside.

ii) Regular Civil Suit No.774 of 2000 is restored to the file of the learned 5th Joint Civil Judge, Junior Division, Pune.

iii) The parties are directed to appear before the learned Trial Judge on 10th July 2006. The learned Trial Judge will thereafter hear and decide the application at Exh.12 made by the Respondent Nos.1 to 5 afresh in the light of the observations made in this Judgement.

iv) All contentions of the parties on merits of the suit are kept open.

. Parties and the concerned Court to act upon an authenticated copy of this order.

Judge.